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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 90

MARTIN E. WOLIN, Individually, MARTIN E. WOLIN, LTD., and CHAL STEEL CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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May, 1954.

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To the Honorable, the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Petitioner Martin E. Wolin respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this cause, which affirmed a judgment of conviction entered in the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW.

The opinion of the Court of Appeals affirming the District Court is as yet unreported. It is to be found at R.

147. The District Court judgment is to be found at R. 22.

JURISDICTION.

Petitioner was charged with the violation of Title 18, Sections 201, 281 and 371, United States Code. The judgment of conviction of the District Court was entered on October 15, 1953. Petitioner filed notice of appeal on October 16, 1953. The judgment of the Court of Appeals was entered on April 9, 1954. On April 16, 1954, petitioner filed a timely petition for rehearing, which was denied on April 29, 1954. Jurisdiction of this Honorable Court is invoked under 28 U. S. C., Section 1254(1).

STATEMENT OF THE CASE.

Petitioner Martin E. Wolin was indicted and convicted of bribing [1] a Government official, Henry Bennett, to issue licenses for the export of tinplate. It is conceded that payments were made by check to Twila Bennett, the wife of Henry Bennett, and deposited in their joint bank account. The only issue in the case below was whether the purpose of these payments was to influence the official action of Henry Bennett or whether they were commissions on account of orders for tinplate placed with Wolin by a customer sent to him by the Bennetts. The issue which we urge here on certiorari deals solely with the methods which the prosecutor used in order to obtain a conviction.

Wolin was an exporter, with offices in New York City. He specialized in the exportation of secondary tinplate. During all times material to this cause, the shipment of tin abroad required a license from the Office of International

[1] The indictment charges bribery of a government employee (18 U. S. C. § 201); it alleges that petitioners aided and abetted a government employee to receive compensation for performing services in a matter in which the United States had an interest (18 U. S. C. § 281); and it charges conspiracy to violate the laws of the United States (18 U. S. C. § 371), particularly the two sections above stated. (R. 2-21)

Trade in the Department of Commerce. Henry Bennett was the licensing officer in charge of this office.

Wolin first met Mr. Bennett and Mr. Bennett's wife Twila in June of 1951. Shortly thereafter, as Wolin testified, Twila Bennett called him by telephone to tell Wolin she knew a Venezuelan customer named Pardo who might be interested in purchasing secondary tinplate from Wolin. Since Wolin's business had gone to pieces during the second quarter [2] of the year, he received the news enthusiastically. The customer appeared and placed substantial orders.

Wolin testified that shortly after the shipments began, Mrs. Bennett raised the question with him of whether or not she was entitled to a commission for sending the South American purchaser to Wolin. Wolin agreed that she was and further agreed to forward to her the usual fee for such services—$5.00 per ton of shipment. Accordingly, as shipments were made to the new customer, checks were drawn in Twila Bennett's name and sent directly to her. There was no attempt to hide the transaction; the checks were reflected on the books of Wolin's corporations, and declared in the Bennetts' joint income tax return for the year. In fact, two—$226.40 and $310.47—were exact multiples at the rate of $5.00 per ton of two of the shipments; the third—in the lump sum of $100.00—was intended to be charged against commissions to become due. A fourth check for $1,972.00 was approximately at the rate of $5.00 per ton and the discrepancy in the amount was fully explained by Wolin. (The Government used circumstantial evidence to attack his explanation.)

The Government conceded that the customer Pardo came to Wolin at the suggestion of the Bennetts, and that the shipments had been made on his orders. It conducted the trial, however, on the theory that the sending of checks to Mrs. Bennett as commissions was a sham to conceal the real transaction. The checks sent to Bennett's wife were,

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[2] About 80 percent of Wolin's business during the relevant time in this case came from Pardo.

the Government claimed, actually intended as bribes to Bennett himself to issue licenses for shipments to Pardo, Wolin's new customer, and to others. Wolin denied this, as outlined above.

The Government produced Henry Bennett as a witness. He had plead guilty to accepting bribes from Wolin in the transactions at issue in this case. His testimony on the stand, however, corroborated completely Wolin's story that the money was paid as commissions and not to influence his official action. He explained that the customer Pardo, because of his control of the tinplate market in Venezuela had a preferential position to receive licenses on his orders. (R. 29, 81, 80) And in his testimony he reiterated over and over again that he received the money, not as bribes, but as commissions on the basis of the usual finder's fee of $5.00 a ton. (R. 72, 31, 34, 35, 48, 51)[3] Bennett contradicted Wolin only by insisting that it was he and not his wife who procured Pardo as a customer for Wolin.

Clearly, if the jury were to believe Bennett's statement that these payments were not intended to influence Bennett in his official duties, but rather intended to serve as commissions, it should have found defendant not guilty. This is precisely the effect of the trial court's charge.

> "Even if these checks were intended for H. G. Bennett, yet if they were not intended to influence him in his official functions, such as in the approval of license applications, but were commissions to compensate him for his procurement of a customer for Wolin, then the defendants would not be guilty of bribery." (R. 126).

Again on conspiracy (R. 129-130) the court instructed that if the defendants agreed

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[3] For example, Bennett testified in direct answer to the question as to the purpose of the payments

> "Q. Was there any conversation about how much was going to be paid, what rate or anything like that? A. $5.00 per ton was to be paid commission for any sales of any party sent to Mr. Wolin." (R. 31)

> "with either of the Bennetts or with both of the Bennetts, only to compensate Twila Bennett or Henry G. Bennett for the services of either of them in procuring a customer for Wolin, as the Court has stated in reference to the compensation and bribery statutes, then the defendants have not committed the crime of conspiracy because that would not be an unlawful purpose."

The purpose of the payments was in the light of these instructions the sole issue in this case.

In order to discredit Wolin's story as to who sent the customer, Twila Bennett (Bennett's wife) was called. Twila Bennett had also been indicted with Wolin in the same indictment and on account of the same transaction. She had plead guilty to aiding and abetting in the bribery of her husband and of conspiring to bribe him. She had not been sentenced. (R. 102) Her testimony produced by the Government in Wolin's trial was, in substance, that she had never contacted Wolin in regard to the Venezuelan customer. She stated that she had not known Wolin had secured orders and made shipments to Pardo during the period in question, or that Wolin had agreed to reimburse the Bennetts for their finder's service, or that the payments by Wolin were for this purpose. She signed the checks, she said, at the request of her husband without inquiring or being told what was the significance of these large checks payable to her. (R. 101, 100, 87, 88, 91) In effect, she testified under oath she was innocent of the plot—yet she was at that very moment awaiting sentence on her own plea of guilty as a conspirator in precisely the same transactions. And the prosecutor, who had acquiesced in her plea of guilty, in his closing argument vouched for her testimony that she was innocent. (R. 116)

As the case went to the jury, all the prosecution had to support its charge of bribery were the inferences which might be drawn from the fact among other circumstances that Wolin had made checks payable to the wife of the licensing officer which were endorsed by her and deposited in a joint bank account in the name of herself and her hus-

band. The Government's principal witness Bennett had contradicted that circumstantial case by clear testimony that the money had been received as commissions for sending a customer and not for licenses. He had further corroborated that testimony by explaining that there was no point in paying the money for the licenses since Pardo's position in the Venezuelan market gave him a preferred position. (R. 29, 81, 80) Twila Bennett's testimony threw no light on the purpose of the payment. She said she knew nothing about the transaction. And the court's instruction was that it made no difference which of the Bennetts sent the customer if the payments were in fact for commissions.

There was an added circumstance which might explain the curious discrepancies between the guilty pleas of the Bennetts and their testimony. Bennett had admitted taking money in cash from five other exporters. (R. 61-62) The Bennetts were faced with other possible indictments for bribery and for income tax evasion. (R. 61) Twila Bennett though she had pleaded guilty had strong reasons not to say anything that would indicate she had any guilty knowledge of her husband's transactions with exporters.[4]

In any event, the prosecutor was faced with the necessity of explaining the corroboration of Wolin by his own witness Bennett. He did not choose to do so. Instead, he made an outright misrepresentation of Bennett's testimony. In his closing statement, after counsel for defense had completed his argument to the jury and could no longer correct any misrepresentation on the part of Government counsel, the prosecutor proceeded to make what was clearly a direct, detailed and positive misrepresentation of what Bennett had said—a misrepresentation that was the cornerstone of his closing argument. He said:

> "You have had Mr. Bennett on the stand who has told you ladies and gentlemen in so many words in plain and simple English, 'I took money. I took money

[4] Twila Bennett undoubtedly hoped for and later actually received a suspended sentence.

in checks.' Why? Because I am a licensing officer. Bennett has told you in plain and simple English, 'I am guilty.' Why would he tell you that? Because he is." (R. 104).

Bennett had said no such thing. Nonetheless, the prosecutor went on: ". . . if you believe Bennett, even in part, Wolin stands before you, ladies and gentlemen, as guilty as sin and his two corporations, too." (R. 116) "Everywhere you turn you have the corroboration for it, for the man [Bennett] who has admitted he lied in the past but got on the stand and told you the truth. Can you have any reasonable doubt? No. Can you have any doubt?" (R. 117).

The misrepresentation is clear.

At the end of this rebuttal argument, counsel for the defense showed the actual record to the District Judge and requested an opportunity to correct the prosecutor's misrepresentation. The court refused and left the case to the jury with a vague admonition that it was their recollection that governed.[5]

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[5] At the close of the argument for the prosecution the following colloquy took place at the bench (R. 119-120):

Judge Arnold (counsel for defendants): Your Honor, counsel said during the course of his argument: "Bennett testified that he took the money because he was a licensing officer." That is contrary to the record. There is not a line of testimony in the record to that effect. The testimony is that he took the money for selling steel and for commissions. The only testimony which is to the purpose is on page 16 (R. 31) and that testimony does not say anything about Bennett taking the money because he was a licensing officer. The statement is so serious and is such a complete departure from the record that I think that we ought to be allowed at this point to make a statement to the jury that it is not so because the jury will not have the record with them. They will have to rely on memory and counsel's complete misstatement of the record.

The Court: I think that the proper way to handle it is for the Court to charge the jury that what counsel says or what the Court says is the evidence is not binding on them; it is what their recollection of the evidence is that counts. * * *

Mr. Arnold: I do not need an exception?

The Court: No sir.

Counsel for the Government, though confronted with the record, did not offer to make the correction himself. Yet in his argument he had made a special point of his position as a representative of the public trust. He assured the jury that "I never prosecute a case looking for a conviction." He told them "I want to argue it fairly. I have tried to do that and I have." (R. 118) And he emphasized frequently that he followed the suggestions of the Federal Bureau of Investigation in preparing the case.

The jury was not able to reach a verdict. After ten hours of deliberation stretching over two days, the jury advised the court that they could not agree. The district judge told them that a trial was a very expensive proceeding not only in money but in expenditure in every other way. The case had been going on for a week or more. (R. 138) He then read the drastic instructions based on the case of *Allen* v. *United States*, 164 U. S. 492, over defendants' objections. The jury went out and returned a second time. It specifically requested that the Allen instruction be reread. The court did so and the jury was finally able to report, after retiring for a third time, that they had reached a verdict.

Wolin was sentenced to eighteen months imprisonment and fines of $1,000 were imposed on both corporate defendants.

OPINION BELOW.

On appeal, the Court of Appeals rejected the contention that Twila Bennett's testimony had been elicited improperly on the ground that inconsistencies in her testimony were for the jury in determining her credibility and in deciding on the weight to be given to her evidence. (R. 148) With respect to the misrepresentation of Bennett's testimony made by the prosecutor, the court merely said:

> "This was apparently an attempt to give the jury the Government's idea of the total effect of Bennett's testimony and the inferences to be drawn therefrom, *and thus to answer the argument of counsel for defendants that there was no proof of a guilty principal whom*

> *defendants could have aided and abetted.* In the light of the record before us, and the Court's precise charge that statements of counsel of what the evidence was, or what it proved, were in no sense controlling on the jury, we think there was here no reversible error." (citing cases.) (R. 148, emphasis supplied.)

The underlined portion of the opinion is supported by the prosecution's brief, but not by the record. When the argument for the defense was made the reporter was excused. No part of the argument was reported. (R. 103) Yet the Government's brief sets out three pages of what purports to be a summary of defendants' argument before the jury.[6] No such argument was made by the defense. Yet it is from this summary not taken from the record that the court below justifies the prosecution's misrepresentation, on the ground that it was an answer to an argument by counsel for defense.

No such argument was made before the jury. It could not have been made because in all the substantive counts Wolin was indicted as a principal. (See for example R. 8) Bennett's innocence of guilty intent would not have been a defense. Thus at the trial the prosecution misrepresented the record, and again on appeal it inserts a summary of an unreported oral argument made up to justify its conduct. The defense in this case has been faced not only by a misrepresentation of the record at the trial, but also with a misrepresentation on appeal adopted by the court below in spite of protest by defendants' counsel on petition for rehearing. (See petition for rehearing, R. 154).

It is our contention that the court below erred in not condemning the tactics of the prosecution. The use of the Twila Bennett testimony and the closing misstatements of Bennett's evidence by counsel for the Government are not issues which may be closed by reaffirming the jury's ultimate responsibility in finding the facts. The practices here

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[6] A certified copy of the Government brief has been filed in this Court. The alleged summary of the argument for the defense appears on Pages 11-13.

illustrated are far too serious. We think the questions raised by them are as follows.

QUESTIONS PRESENTED.

1. May counsel for the Government, in order to discredit the defendant in a close case, use impeaching testimony which he knows is directly contrary to a plea of guilty previously accepted from that witness?

2. May counsel for the Government, in a close case, affirmatively misstate favorable evidence in his rebuttal argument and decline to correct it when the record is shown him?

REASONS FOR GRANTING THE WRIT.

This case represents such a substantial departure from the accepted and usual course of judicial proceedings in the prosecution of a criminal case as to call for an exercise of this Court's power of supervision. The decision of the lower court is in conflict with the decisions of this Court. To achieve the conviction of the petitioner here the lower court permitted the prosecutor boldly to misrepresent a crucial fact in his closing argument to the jury without permitting its correction. And it permitted the prosecutor to produce evidence prejudicial to the defendant by a witness whom the prosecutor must have believed to be perjuring herself. The prosecutor and the court had accepted a plea of guilty from this witness and yet permitted her to testify to a version of the transaction which would have made her innocent, such version contradicting the defendant's account of the transaction.

The Court of Appeals justified the misrepresentation to the jury on the ground that it presumably was in answer to an argument of defense counsel. Such argument was not in fact made by defense counsel, but had it been, there would have been no excuse for misrepresentation of the facts to the jury or failure to correct that misrepresentation. All this took place in a case where the issue was in close balance and a verdict of guilty was brought in only after the jury

was twice admonished under the Allen instruction to come to agreement. To permit a conviction to stand when achieved by such tactics on the part of the prosecution is certainly such a departure from accepted standards of judicial procedure as to require this Court's intervention. Further, it conflicts with the rulings of this Court concerning the duties of a prosecutor as set forth in *Berger* v. *United States,* 295 U. S. 78, and *Mooney* v. *Holohan,* 294 U. S. 103.

ARGUMENT.

We fully recognize the fact that in the ordinary case, where evidence of guilt is reasonably clear, hard blows by the counsel for the prosecution are not error. But where the evidence of guilt becomes more doubtful, and where it is obvious that the jury had extreme difficulty in arriving at a conclusion, then the prosecution bears a heavy burden to proceed with fairness and objectivity. This Court has said just that:

> "Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. . . . A slight thing may have turned the balance against the accused . . . ." *Burton* v. *United States,* 196 U. S. 283.

This is just such a case and defendant is entitled to every rule of fairness from counsel for the Government. There was here, as the Court found in *Glasser* v. *United States,* 315 U. S. 60, 67, that "slight impetus which swung the scales toward guilt." The only impeaching testimony came from Twila Bennett. Henry Bennett testified in support of plaintiff's statement that the payments were intended as commissions or finders' fees, and not as bribes. Yet the Government adduced Twila Bennett's impeaching testimony knowing it to be flatly inconsistent with her plea of guilt which it had previously secured, and affirmatively mis-

stated the Henry Bennett testimony which corroborated petitioner Wolin. When the record was shown to the prosecutor he objected to any correction and the court sustained him.

Even if the case was not close such conduct shouldn't be ignored. But the case was close. The jury returned twice and could only reach a unanimous verdict after the *Allen* charge had emphasized the cost and trouble of the long trial. Errors of the sort complained of here cannot be ignored.

1. The Government's Use of Twila Bennett's Testimony.

As we point out above, at the time of her testimony on Wolin's trial, Twila Bennett had pleaded guilty to an indictment charging her with being a member of the conspiracy. Yet, as the excerpts from her testimony which follow show, she testified on direct examination by Government counsel to complete innocence (R. 87, 88-89, 90-91, 93, 101). Typical is the following:

> "Q. Now, can you tell these ladies and gentlemen again what happened at the second meeting at the Statler? A. At the second meeting it was very similar to the first. We went into the Embassy Room and had a few cocktails before dinner and then had dinner.
>
> Q. Was there any talk during dinner? A. Yes, they were again talking over licenses and so forth. Of course, as usual, I wasn't paying too much attention to the conversation." (R. 88-89)

In sum, Twila Bennett said she was innocent, that she was not aware of Wolin's arrangement to pay her commissions. The prosecution invited this precise testimony. It put her on the stand. It asked the questions. It claimed no surprise. It expected these statements. And it vouched for them before the jury in closing argument:

> "You know who she's going to be sentenced by, in front of you, don't you, the good Judge that is sitting on the bench right now. Do you suppose she would

want to lie on the stand in front of him? What kind of reasoning is that? It is all the more reason she should tell the truth." (R. 116)

The record certainly indicates that Twila Bennett was not telling the truth. It is scarcely credible that she could have received, endorsed and deposited those checks knowing nothing of the purpose for which they were given. But the prosecutor could not have believed her story, for he did not ask the court that her plea of guilty be withdrawn. He should not be permitted to acquiesce in a plea of guilty to convict Twila Bennett, and then to attack Wolin by vouching for the truth of her lack of participation in the same criminal transaction.

We think the prosecution overstepped the bounds. Affirmative use of such evidence should not be condoned. *Mooney* v. *Holohan*, 294 U. S. 103, long ago established that Government counsel could not introduce testimony it knew to be false; such a practice violates the essential rules of fairness incorporated in the due process clause of the Fourteenth Amendment.

We do not have to rely on due process here. This case presents only the question whether the prosecution violated fair and decent standards. For that reason it was even more incumbent on Government counsel in this case to bear high standards of fairness than in *Mooney*. Twila Bennett's testimony was highly important. If believed, it showed that Wolin was lying. The Government accepted her testimony and endorsed it, knowing full well that it was inconsistent with the plea of guilty. We do not contend that Government counsel conspired with Twila Bennett to perjure herself; we do contend that he supervised the presentation of evidence which he must have believed was untrue as against Twila Bennett's plea of guilty. His responsibility was clearly more serious than that. In *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 335 (6th Cir. 1938), it was held that the introduction of false testimony even where the prosecution did not know its character

at the trial violated the due process clause and justified collateral attack on the judgment of conviction.

2. The Government Counsel's Misstatement of the Crucial Evidence.

At the close of the presentation of the evidence, Wolin's position was most favorable. He had testified and Bennett had supported him, that the payments had been made as commissions and that there was no intent to bribe Bennett. Circumstantial evidence looked the other way, but Bennett's testimony was strong and the jury might well have concluded that a reasonable doubt of guilt existed. The prosecution, in his rebuttal argument, however, supplied the needed ingredient; he recast completely Bennett's testimony:

> "You have had Mr. Bennett on the stand who has told you ladies and gentlemen in so many words in plain and simple English, 'I took money, I took money in check.' Why? Because I am a licensing officer. Bennett has told you in plain and simple English, 'I am guilty.' Why would he tell you that? Because he is." (R. 104)

Counsel for petitioner protested vigorously. (R. 119-120). The district judge decided, however, that the proper way to handle it was to charge the jury that it is what their recollection of the evidence is that counts. (R. 120).

Clearly, though, this was not the sort of slightly-warped comment on the evidence that may be ignored by the trial court. It went to the very heart of the issues and might very well have been crucial in this close case. Further, it was plainly erroneous. Bennett clearly never stated, as the prosecution put it, "in plain English, 'I am guilty.'" Indeed, he did not testify that the money had been sent to Twila Bennett "because (he) was a licensing officer." Bennett did testify, to the same effect as Wolin:

(1)—that he, Bennett, had told the South American customer that Wolin had the tin plate, and gave him Wolin's address.

(2)—that bribery for licenses would have been pointless because the new customer, as representative of all Venezuelan interests, received them automatically.

(3)—that he had told Wolin to pay the commissions either in cash or checks, "providing a record is made on his (Wolin's) books", and

(4)—that he did not consider the payments as inducements for licenses, but as good faith commissions. We refer the Court to the record, R. 31, 34-35, 37, 48, 51, 71-72.

A misrepresentation of testimony so important to defendant should not be condoned. The case is ruled by *Berger* v. *United States,* 295 U. S. 78. There, as here, the prosecution, in his closing argument, made statements of fact directly contrary to the record or not supported by the record. We think the same "improper insinuations and assertions calculated to mislead the jury", *Id.* at 85, were present here. Our contention is supported by the numerous cases where similar argument and misstatement have been condemned. See *McCall* v. *United States,* 192 F. 2d 468 (5th Cir., 1951); *United States* v. *Sprengel,* 103 F. 2d 876 (3rd Cir. 1939); *Turner* v. *United States,* 35 F. 2d 25 (8th Cir., 1929).

The court below did not attempt to affirm on the ground that the statement was accurate. Instead, it held that it was justified, on the theory that counsel for defendant had invited just such an argument, by his closing statement to the jury. It said:

> "This [the misrepresentation of Bennett's testimony] was apparently an attempt to give the jury the Government's idea of the total effect of Bennett's testimony and the inferences to be drawn therefrom, and thus to answer the argument of counsel for defendants that there was no proof of a guilty principal whom defendants could have aided and abetted." (*Ibid.*)

The court took this not from the record but from the Government's brief in the Court of Appeals,—a self-serving

summary of an argument which was not reported. We have secured a certified copy thereof from the Court of Appeals clerk and it is to be found with the transcript original record in the office of the Clerk of this Court. The original text is to be found in that brief at page 15.

Furthermore, *counsel for the defendant made no such argument,* on the closing or at any other time. Indeed, it would have been idle for him to have done so because Wolin was a principal in the charges of bribery and conspiracy, not an aider and abettor. We protest the tactics of the prosecution. We think the one misstatement of the record in the trial court was quite enough to justify a new trial; the second, made on appeal, we think illustrates the irresponsible standards of the prosecution in getting—and sustaining—a conviction.

Counsel for the United States, in criminal trials, enjoy a high status and respect and have great power to use their position to dilute the essential safeguards of fair trial. Where, as here, there is a serious departure from standards of fairness this Court should exercise its final supervisory authority and condemn the practice.

We do not think that the question we raise here should be brushed aside because of the feeling that it is highly improper for a person dealing with a government official to give a commission to his wife. Had the prosecutor based his case on the inferences which could be drawn from Wolin's conduct there would be no question before this Court on certiorari. But he did not choose to do so. He obtained the conviction by misrepresentation of the evidence and by introducing testimony of innocence from a person who had plead guilty with his acquiescence. If such methods are approved they will soon become standard practice. And it is no answer to the misconduct of the prosecutor to elicit from counsel for the defense, as the Court of Appeals did, the reluctant admission that he considered the conduct of his client reprehensible.

> "Counsel for defendants admit that it was reprehensible here for defendants to employ the Bennetts on

> commission to secure export tin business for defendants, when Wolin well knew no tin could be exported without a license from Bennett, acting in his public official capacity." (R. 150)

Neither unethical conduct on the part of a defendant nor the existence of a circumstantial case against him should be a license to the prosecution to transgress the rules of fair and orderly procedure. And let it not be forgotten that unless the prosecution is held to these rules, the rules themselves will vanish.

CONCLUSION.

We are not asking the Court to review the evidence, close as it is in this case. We are asking it to pass on what we conceive to be highly important issues of Government responsibility in criminal trials. We contend that in this case, counsel for the Government unfairly prejudiced petitioner by adducing evidence he must have believed to be false and by misstating evidence he knew to be favorable to petitioner. We would, therefore, close our argument with the language of this Court in the *Berger* case, *supra* at 88, language we believe to be directly applicable here:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to

produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Respectfully submitted,

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18 U. S. C. (Supp. V):

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304934—54——1

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 90

MARTIN E. WOLIN, INDIVIDUALLY, MARTIN E. WOLIN, LTD., AND CHAL STEEL CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 147–151) is reported at 211 F. 2d 770.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1954 (R. 152), and a petition for rehearing (R. 152–R. 156) was denied on April 24, 1954 (R. 157). The petition for a writ of certiorari was filed on May 24, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, at a trial involving charges of bribery of a government employee, the testimony of the employee's wife, to whom the checks were made payable, that she paid little attention to the details of the arrangement with her husband was so inconsistent with her plea of guilty as to render the use of her testimony willful misconduct by the prosecution.

2. Whether the prosecuting attorney, in his argument to the jury, misstated the evidence given by a principal government witness in such manner as to require a new trial.

STATUTES INVOLVED

18 U. S. C. (Supp. V) 201 provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which

> may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

18 U. S. C. (Supp. V) 281 provides, in relevant parts, as follows:

> Whoever, being * * * or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court marshal, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U. S. C. (Supp. V) 371 provides, in relevant part, as follows:

Petitioner talked generally about applications for licenses and suggested to Bennett that it would be legal for him to sell steel while continuing his government position. He said that the matter could be handled by putting Mrs. Bennett on the payroll and making payments to her. (R. 25–28.)

Shortly thereafter, Bennett told a Mr. Pardeo, who wished to purchase tin plate, of the type of material that petitioner had and said that "if he could use some of that material I felt that we could give him a license. Since he was buying for all Venezuelan trades, that is." (R. 29.) Thereafter, when petitioner called about some of his applications, he told Bennett that Pardeo had been to see him and that he was sending an application through (R. 29). Petitioner again took Bennett and his wife to dinner and gave Bennett $500.00 in cash (R. 30). Arrangements were made to send the license applications to Bennett's home in order to make it appear that Mrs. Bennett was doing the work. (R. 32–33.) Bennett testified that petitioner "knew that if Mr. Pardeo purchased material from him that I would grant a license" (R. 31).

In September 1951, petitioner arranged for the purchase of a car in Henry Bennett's name, partly with Bennett's money and partly with money advanced by petitioner, which was said to be a commission on sales to Pardeo (R. 33–40). Petitioner drew a check in the sum of $1,972 to the order of Mrs. Bennett to have a

record of payments, including the money paid to Bennett in cash (R. 38, 73). Petitioner explained the amount by stating that he credited an order that was to be processed after he left for Europe and said that a subsequent check for $226 to Mrs. Bennett was a mistake (Tr. 1218–1220, see R. 105–107).

When petitioner left for Europe in October 1951, he told the Bennetts that Mrs. Halperin would handle licenses and commissions (R. 44). Subsequently Bennett promised Mrs. Halperin that 15 applications for licenses for sales in Italy and Portugal to be filed by the Chal Steel Corporation, one of the corporate defendants in this case, would be in order (R. 46, 50). Bennett approved them all but seven were not recorded by him in accordance with the normal routine of the Office of International Trade (R. 51).

During the third and fourth quarters of 1951, when substantially all of the petitioner's license applications were approved, other exporters' applications for sending secondary tin plate to Italy were being returned without approval at the rate of 8 returned for every one approved (Tr. 807–808; see also Tr. 1112). Indeed, Bennett himself told one complaining exporter in November 1951, that tin plate licenses were not being issued (Tr. 1102).

The testimony of Mrs. Bennett (R. 85–102), on the basis of which petitioner frames one of his present contentions, was to the effect that she

accompanied her husband on the occasions on which he and petitioner worked out their plans for the payment of commissions (R. 89), the sending of applications to the Bennett home (R. 88), and the placing of Mrs. Bennett on petitioner's payroll (R. 87, 89, 91). She testified that she was aware of these arrangements although she did not pay too much attention to the conversations (R. 87, 88), and that she was present during most of the negotiations for the purchase by the Bennetts, through petitioner, of an automobile (R. 92–93). She testified also that she was not responsible in any way for referring Pardeo to petitioner (R. 97–98), and that the so-called commission checks issued in her name, some of which she had deposited in the bank, were for her husband (R. 96–97).

After the presentation of evidence on both sides was complete, the prosecuting attorney stated, in the early part of his summation to the jury:

> My job is to put before you as best I can all the admissible evidence that can give you an adequate picture of what happened and that is what I will try to do. * * * Now during the argument it is my job to try to point out to you conclusions, inferences that you can draw from these facts, and that is what I intend to do. I have to rely on my memory in recalling the evidence. I don't have a transcript of the record. Unfortunately I understand that Judge Arnold and Mr. Boothe [defense

> counsel] have certain parts of it. If in recalling evidence to you, ladies and gentlemen, and believe me, I mean this, I don't agree with your recollection of what happened, take your own. I am not trying to mislead you. My memory may be bad. I am trying to remember the evidence as I recall it. So if I say something and you don't remember it that way, take your own on it, but believe me, I am not doing it intentionally. [Tr. 1361.]

In addition, the prosecuting attorney referred to the fact that Mrs. Bennett had pleaded guilty, and to the fact that she was unsentenced, and suggested that the fact that she would later have to appear before the same judge for sentencing was an incentive for her to testify truthfully (Tr. 1407).

Defense counsel then made their summation to the jury, which was not reported (R. 103), following which the Government made rebuttal argument. This argument contained the statement which is made one of the bases for review by this Court. It is italicized in context:

> Some of the remarks made by Mr. Arnold and Mr. Boothe, I think principally by Mr. Arnold, went to the effect that there is nothing wrong about entertainment. The mink coat era is fine. It is all right to take Government employees out and show them a good time. If it is done for one purpose.

Sure. If it is done for another purpose, no. You folks read the newspapers. You have seen stories in the newspapers. Let me put it to you this way: For every Government employee who has done wrong by taking money, gifts and stuff like that for doing something in the government, he doesn't do it on his own money, doesn't come out of the thin air and say, hello, Mr. Bennett, here I am. You have to have a Wolin in the background and in the foreground. You can't have a dishonest Government employee unless you've got someone giving him the money. It is impossible. And the only way that the Government service can be straightened around is not only to get the Government employees who do something wrong but to get the people that give it to them because it takes two to make that kind of a party. Believe me. Money doesn't grow on trees. It is given for a purpose. So that you have this instance here in front of you. *You have had Mr. Bennett on the stand who has told you ladies and gentlemen in so many words in plain and simple English, "I took money. I took money in checks." Why? Because I am a licensing officer. Bennett has told you in plain and simple English, "I am guilty." Why would he tell you that? Because he is.*

Now who created the situation. Who gave the wherewithal, who gave the money, who gave the push? The man who is on trial here today. You don't clean up the

> Government, you don't get the Government employees by going after them alone. You have to get the source of it, too. So when the argument is made to you ladies and gentlemen that entertainment is fine, that the mink coats and everything is all right, I say to you again, and your responsible citizens, come from your walks of life, spend here a couple of weeks—you spent all of last week in this case—to clean up a situation like that, there are two ways. If you go about both of them you clean it up. One, you get the Government employee who isn't living up to his trust and, No. 2, you get the party on the outside of the Government who doesn't think enough of the United States Government to stay away from its employees with money and checks. [R. 103–104; italics added.]

At the close of this rebuttal, defense counsel objected to the italicized portion of the statement, urging that the "statement is so serious and is such a complete departure from the record that * * * we ought to be allowed at this point to make a statement to the jury that it is not so because the jury will not have the record with them [and] * * * will have to rely on memory and counsel's complete misstatement * * *" (R. 119–120).

The trial judge said that he thought that the proper way to handle the matter was to instruct the jury that it was their recollection rather than counsel's statement which counted, and at the

very opening of his charge, he did so (R. 120), stating, *inter alia:*

> You rely upon your own recollection and if the Court says anything * * * in respect to the evidence that is contrary to your recollection, you will follow your own recollection and judgment and the same is true with reference to what counsel may have said to you in their recollections of what this witness or that witness said is not conclusive upon you at all. * * *[2]

After the jury had retired and had been out approximately five hours, they returned to request a transcript of the evidence. They indicated that they wanted all the available testimony, but were particularly interested in the testimony of the petitioner (R. 134–135). Although all of the testimony had not been transcribed, what they were given included the testimony of petitioner and that of Bennett (R. 135). Later, after the jury had indicated its inability to reach a verdict, and after the court had given the so-called "Allen charge," a verdict of guilty was reached (R. 143).

The petitioner, Martin E. Wolin, individually, was sentenced to 18 months' imprisonment, and the two corporate defendants, to pay $1,000 fines

[2] Also, later in the charge, after reviewing the facts that had been presented, and the issues which were open to the jury, the court said again:

"* * * It does not mean to tell you that in its opinion any of these facts exist except those that I have enumerated as being uncontradicted. * * * It is for you to determine whether or not those facts do exist in this case." [R. 130.]

(R. 143–144). The judgment was unanimously affirmed by the Court of Appeals (R. 152).

ARGUMENT

1. Petitioner argues that Mrs. Bennett's testimony was so clearly inconsistent with her plea of guilty that the prosecutor's use of such testimony represents knowing misconduct. The contention is patently frivolous.

Mrs. Bennett's testimony was not inconsistent with her plea of guilty. The fact that, as her testimony suggests, she did not pay detailed attention to the arrangements between petitioner and her husband (see Pet. p. 12) does not mean that she claimed to be aware of so little of the transaction as not to be criminally liable for her participation therein. She admitted that she knew that she was participating in an arrangement whereby she would be put on petitioner's payroll (R. 87), that petitioner was to send license applications to her for remailing to the Department of Commerce (R. 88, 89), and that she was to be paid at the rate of $5 per ton (R. 89). She testified further that her husband had told petitioner he did not think the arrangement would be legal, although petitioner assured him that it would be (R. 89; see also R. 91). She testified that petitioner's applications were received by mail at her home, and that she either mailed them to the Office of International Trade herself or her husband took them personally

(R. 90; see also R. 95). She testified that she received checks from petitioner, purportedly for commissions, even though she had done nothing to earn them (R. 96–97), and she testified that petitioner had given her a diamond and ruby pin (R. 98). Her testimony was thus not a declaration of innocence.

Moreover, Mrs. Bennett's allegedly ambiguous status was apparent to the jury. She explicitly testified that she had pleaded guilty and was unsentenced (R. 102) and the Government referred to these facts in its summation (Tr. 1407). The jury, therefore, was able fully to appraise her worth as a witness in accordance with the full instructions to the jury by the court on that point (see R. 132).

2. Petitioner also argues that this Court should grant his petition in order to censure the prosecutor for having made what petitioner says are misstatements of crucial evidence during his rebuttal summation to the jury (Pet. 14–17).

The first objection to review of this point by this Court is procedural. No report was made of the summation for the defense, to which the language complained of is, at least apparently, a response. A reviewing court cannot, therefore, appraise, out of the context necessary to understand it, a remark of a government attorney made in course of such rebuttal. See e. g., *Landay* v. *United States,* 108 F. 2d 698, 706

(C. A. 6), certiorari denied, 309 U. S. 681; *Vause* v. *United States,* 53 F. 2d 346, 354 (C. A. 2), certiorari denied, 284 U. S. 661.

In any event, there was no misstatement, but at most a restatement or interpretation of the witness's testimony. Bennett's testimony was clear to the effect that petitioner constantly talked with him about approval of license applications; that petitioner expected Bennett to approve licenses for shipments to Pardeo (R. 31). Bennett recognized that his conduct, objectively viewed, showed favoritism toward petitioner (R. 84). Bennett unqualifiedly stated that he, rather than Mrs. Bennett as petitioner had testified, took the money. In the light of all the evidence it was not unfair to say that Bennett testified that he took it because he was a licensing officer and, in effect, that he was guilty.

The statement was not part of a complete review of the evidence, as petitioner suggests, but was principally a way of making clear that no government employee can be involved in a bribe without there being someone out of government who is also blameworthy. For the purpose of setting in context petitioner's guilt as instigator, Bennett's plea to the offense was stated, in perhaps overly simplified terms, but certainly not in essential falsehood. In short, examination of the second and third paragraphs of the rebuttal argument (R. 103–104), rather than merely the short excerpt to which petitioner refers, discloses that

petitioner's request for review on this phase of the case is based on a misleading abbreviation of the record.

Moreover, the trial judge, in response to petitioner's objections, emphasized to the jury at the very outset of its charge, that the jury's own recollection of the facts was governing (R. 120), and later explicitly reiterated the charge (R. 130). The importance of Bennett's part in the transaction has been stressed from the very beginning of the case by petitioner's own counsel who said in his opening statement (Tr. 588):

> We have here a sixty page indictment in thirteen counts, presented against this man, and yet from that mass of papers, there is only one question involved and that is, Did Wolin pay any compensation to Twila Bennett to get him business or did he pay compensation to Bennett to have him issue licenses? [See also Tr. 593–594.]

In the face of the centrality of this issue from the beginning to the end of the case, the jury must have paid particular attention to the testimony bearing upon it so that they could not have been misled by the one statement upon which petitioner relies. This is all the more true in view of the fact that during the jury's deliberations, the record was requested (R. 134). Although it was requested for the purpose, particularly, of looking at petitioner's testimony and

although all of the record was not furnished, the Bennett testimony was (R. 135–136), so that, as to this issue, the jury did not have to rely in any way on the prosecutor's recollection.[3]

[3] In his petition for certiorari, petitioner makes much of what he called an additional misrepresentation made by the prosecution in the Court of Appeals. He refers to the government's brief in the Court of Appeals and the opinion of the Court, apparently in reliance on it, that the Government rebuttal in the trial court was "apparently an attempt to give the jury the Government's idea of the total effect of Bennett's testimony and the inferences to be drawn therefrom, *and thus to answer the argument of counsel for defendants that there was no proof of a guilty principal whom defendants could have aided and abetted.*" [Emphasis added, see Pet. 15.] Petitioner says no such argument was made, and attempts to demonstrate that no such argument could have been made.

We have suggested above that this Court's certiorari jurisdiction is not a device to resolve arguments about what happened in the trial court, particularly where defense counsel apparently elected to keep the real events unrecorded. We also suggest that, contrary to petitioner's argument here that he could not have made an aider and abetter argument in the trial court because in all the substantive counts petitioner was indicted as a principal (Pet. 9), there were in fact aider and abetter charges in the case against petitioner (see counts 1 to 4, Tr. 1–9). Although sustaining the conviction does not depend on those counts, it is clear that the trial judge talked about those counts in his charge to the jury (R. 123–125), and it seems at least plausible that petitioner's counsel might have talked about them.

The record reveals, moreover, a further curious fact on this aspect of the case. The very "misrepresentation" which petitioner says the Court of Appeals accepted was also made in the District Court. After verdict and judgment, the petitioner made a motion for a new trial in which he relied, in part, on the alleged misstatements as to Bennett's testimony (Tr. 485–500). The Government explained the statement almost word for word as it did in the Court of Appeals, in a

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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Solicitor General.

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Attorneys.

JULY 1954.

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memorandum filed and argued before the very judge who had just tried the case (Tr. 506–543, especially 513–515). Petitioner thereafter, and before the motion was ruled on, filed a supplementary memorandum on other points which were involved in this motion, but did not challenge the truth or the logic of the prosecution representation (Tr. 544–550).

Later, in the Court of Appeals, the matter was challenged only by a petition for rehearing in which petitioner conceded that he had been remiss in not calling the court's attention before argument to the alleged misrepresentation in the Government's brief (R. 155).

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IN THE

Supreme Court of the United States

October Term, 1954

No. 90

MARTIN E. WOLIN, Individually, MARTIN E. WOLIN, LTD., and CHAL STEEL CORPORATION, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

I

In its opposition to certiorari the Government does not contest our position that a prosecutor outsteps all decent bounds when he introduces testimony which he believes to be false. The sole question, therefore, is whether the prosecutor actually believed Twila Bennett's testimony that she had nothing but the most casual participation in the alleged bribery and no guilty knowledge of the purpose of the transaction.

It is clear from the Government's argument (pp. 13-14, Brief in Opposition) that the prosecutor did not believe at the time of the trial Twila Bennett was telling the truth nor does he believe it today. In some detail the Government points out the circumstantial evidence which justifies its belief that she is guilty and that she had much more

to do with the transaction than appears in her testimony. The conclusion is, therefore, inescapable that the Government knew she was lying when she disclaimed any guilty participation in or any guilty knowledge of the alleged crime. How then can the Government justify putting such testimony in evidence and commenting on it as follows:

> "You know who she's going to be sentenced by, in front of you, don't you, the good Judge that is sitting on the bench right now. Do you suppose she would want to lie on the stand in front of him? What kind of reasoning is that? It is all the more reason she should tell the truth." (R. 116)

It was a crucial part of the Government's case to contradict Wolin's story that the transactions were between Twila Bennett and Wolin. The prosecutor did so by Twila's testimony that she had only a casual connection with the transactions and no guilty knowledge of its purpose. This is the testimony the prosecutor vouched for in the above statement.

And now the Government appears before this Court saying that the circumstantial evidence against Twila Bennett was so strong as to make the Government believe then and now that she was guilty of bribery and conspiracy to bribe and that her testimony that she had no guilty part in the transactions was false.

We submit the conviction should not be obtained in that way even if the evidence had been so clear that in an ordinary case it would have been non-prejudicial error. But the Solicitor General does not even argue that the error was non-prejudicial. He could scarcely do so since the jury hung and the *Allen* instruction was read to it twice. The Solicitor General takes the bold position that it was a proper practice for the prosecutor to vouch for the testimony of Twila Bennett which he now concedes is unworthy of credibility because of the circumstantial evidence against her. And the Court of Appeals by its opinion below has sanctioned such a practice.

II

Equally damaging to every theory of orderly and fair practice is the failure of the Court of Appeals to consider as error the misrepresentation made in the closing argument of the prosecutor as to the testimony of Henry Bennett. Henry Bennett's testimony was as inconsistent with his guilty plea as was Twila Bennett's. It completely corroborated petitioner's statement that the payments were for commissions not for licenses. The prosecutor must have been keenly aware of this corroboration. It was the principal stumbling block in the way of a conviction. He escaped his dilemma by a vivid misstatement and strenuously objected to any correction of that misstatement when the transcript was called to his attention.

In attempting to defend that error in this case counsel for the Government (who were not present at the trial) copied into their brief on appeal the prosecutor's version of an alleged argument made by counsel for the defense which was not reported. This version appeared in their brief as if it were part of the record. The court below based its decision sustaining the Government solely on the ground that such an argument had been made and refused to correct its opinion after it was called to its attention that the record did not support the opinion.

The Solicitor General now for the first time discloses where the Government found its version of the unreported argument upon which it so heavily relies. It is taken from the prosecution's argument opposing a motion for a new trial. The Solicitor General thinks its truth is corroborated by the fact that it is taken word for word, not from the record, but from the prosecutor's statement. Counsel's protest that he never made such an argument and that it would have been foolish to make it is brushed aside on the ground that it is "at least plausible that petitioner's counsel might have talked" about this trivial issue. (Br. 17)

Of course an appellate court cannot decide what defense counsel said in the absence of a transcript or other evi-

dence. But that is precisely what the court below did in its opinion. And so we have the misrepresentation of the evidence by trial counsel compounded by a misrepresentation of the record on appeal in order to justify the trial misrepresentation.

In all candor, if this procedure is sanctioned, what protection has counsel for the defense against the bare assertion of the Government as to matters outside the record? This procedure is such a substantial departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We believe that the opposition brief of the Government which attempts to sanction the practices indulged in in this case establishes by that very fact a case where this Court should grant certiorari.

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July 1954.